

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT ELLIS,)	
)	
Claimant,)	IC 2006-000919
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
TRANSSYSTEMS,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	Filed September 13, 2007
)	
AMERICAN CASUALTY COMPANY)	
OF READING, PA,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on February 6, 2007. Claimant, Robert Ellis, was present in person and represented by Delwin Roberts of Idaho Falls. Defendant Employer, Transsystems, and Defendant Surety, American Casualty Company of Reading, PA, were represented by Tyra Stubbs, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on April 23, 2007.

ISSUES

The issues to be resolved are:

1. Whether Claimant suffered an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Whether Claimant is entitled to medical care; and,
4. Whether Claimant is entitled to total temporary disability benefits.

ARGUMENTS OF THE PARTIES

Claimant asserts he suffered an industrial accident on January 10, 2006, while driving truck for Employer when he hit a large pothole and injured his back. He asserts entitlement to medical care and temporary disability benefits for his back injuries.

Defendants Employer and Surety contend that Claimant's account of an industrial accident is not credible, that he has a long history of pre-existing back problems, that any incident on January 10, 2006, did not cause his current back complaints, and that Claimant is not entitled to medical or disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Todd Albright, and Thomas Hitt taken at the February 6, 2007, hearing;
2. Claimant's Exhibits 1 through 3 admitted at the hearing; and
3. Defendants Employer and Surety's Exhibits A through DD, admitted at the hearing.

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Defendants’ “Motion to Augment Record to Add New Defendants’ Exhibit DD [sic]” seeking to place in evidence the records of Darrell Holloway is denied for the reason that such records were not available prior to hearing.

After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. In the late 1980s, while working for another employer, Claimant lifted a filing cabinet and injured his back. In 1990 he underwent a lumbar laminectomy. In 1993, Claimant suffered whiplash in a car accident and complained of back pain. In 1996, Claimant complained of rectal incontinence. An MRI and colonoscopy provided no explanation for his asserted incontinence. While working concrete in 1997, Claimant further injured his back and reported bilateral leg pain and numbness in his left leg. Later in 1997, Claimant underwent lumbar epidural steroid injections without improvement. An MRI showed a small disk protrusion. In 1999, Claimant underwent L5-S1 fusion. Claimant experienced further back pain, and in 2003 another lumbar MRI was ordered to evaluate his complaints.

2. In January 2004, Claimant noted increased back pain after helping paramedics lift his father. Claimant presented to several different physicians during 2004, including Robert Perko, M.D., Louis Schlichman, M.D., Richard DuBose, M.D., Samuel Jorgenson, M.D., Clinton Mallari, M.D., and Harold Thompson, M.D., with complaints of continued lumbar pain. Claimant received further diagnostic testing, various prescription medications, and physical therapy. In March and April 2004, Claimant reported to his physical therapist the reoccurrence of bilateral leg pain and rated his low back pain at 7 or 8 on a scale of 1 to 10. Claimant also reported loss of bowel and

bladder control a couple of times the prior year. Claimant's diagnostic studies were reviewed by a surgeon who declined to offer surgical intervention. In late 2004 Claimant applied for Social Security disability benefits per his doctor's recommendation.

3. Claimant testified at hearing that after his prior back surgeries and until January 2006, he lived a normal life, was able to drive 300 to 400 miles in his car without stopping, and took care of routine household chores such as laundry and dishwashing. He testified he had mild muscular pain—mostly fatigue—which he managed with Advil.

4. Claimant worked periodically as a long haul truck driver. On December 27, 2005, Claimant commenced working for Transystems. Claimant hauled sugar beets over paved, gravel, and dirt roads. In January 2006, he was six feet tall and weighed 240 pounds.

5. Claimant testified that on January 10, 2006, portions of the gravel roads upon which he drove had many pot holes. Defendants dispute this assertion. Claimant testified that about 1:30 p.m. on January 10th, while driving a loaded truck at approximately 35 miles per hour, he hit a large pothole on a gravel road causing the air seat of his truck to “bottom out” and bouncing him up and down. Claimant testified that he felt and heard three loud “pops” and felt immediate pain in his lumbar and thoracic spine. He testified that with the loudest “pop” he felt immediate low back pain and numbness which radiated down his sciatic nerves in both legs. Claimant testified that he “had to go to the restroom really bad” when he had picked up the load, so upon arriving at the factory to unload he stopped at a port-a-potty. Transcript, p. 23, Ll. 5-6. He testified that upon arriving at the port-a-potty his legs felt like jello and he discovered that his “trousers were soaking wet” and he had “stained [his] shorts.” Transcript, p. 23, Ll. 10-14. Claimant testified this was different from prior bladder and bowel incontinence that he had experienced. He testified that his left leg was so numb

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he had to use his left hand to help push in the clutch. Claimant testified that he had never experienced such pain before.

6. In spite of his alleged severe pain and incontinence, Claimant worked the remainder of the day on January 10th. He completed his time sheet at the end of the day and, in response to a printed question on his time sheet of “WERE YOU INJURED ON THE JOB TODAY? YES / NO”, Claimant made no entry. Defendants’ Exhibit Y, p. 7. (Claimant had entered “NO” in response to this question on his time sheets for each of the three previous work days, but had made no entry to this question on his January 4, 2006, time sheet.) Claimant did not report any accident that day to his Employer, nor did he seek medical attention. Claimant drove himself home in his own vehicle from American Falls to Pocatello.

7. Claimant was not scheduled to work on January 11, 2006, and he laid around his home. He did not seek medical attention although he testified that his back pain continued.

8. Claimant returned to his normal work duties on January 12th. Claimant testified that he dealt with bladder incontinence off and on throughout the day as he worked. However, he did not report any accident to his Employer, nor did he seek medical attention.

9. On the morning of January 13, 2006, Claimant telephoned a Pocatello physician indicating he had reinjured his back and seeking a referral to Benjamin Blair, M.D.

10. At approximately 5:45 p.m. on January 13, 2006, Claimant presented to a hospital emergency room with complaints of back pain. The emergency room records indicate that Claimant reported he hit a bump three days earlier and felt his back pop. Claimant also reported occasional loss of bowel and bladder control. Claimant brought his prior MRI films with him to the emergency room. An emergency MRI scan was taken. Comparison of the emergency MRI with Claimant’s

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prior MRI revealed no acute disk injury or cord compression. He was given medication.

11. On January 16, Claimant and his supervisor completed a notice of accident form for his alleged January 10, 2006, accident.

12. Claimant sought further medical attention on January 25, 2006, complaining of lumbar and leg pain, however, medical evaluation revealed no motor deficits. He was given prescription medications.

13. Dr. Blair examined Claimant on January 27, 2006, but found no obvious nerve impingement. Shortly thereafter, Claimant began treating with Henry West, D.C. Claimant advised these practitioners that he was experiencing only minimal back symptoms from the time of his back fusion until his alleged January 10, 2006, industrial accident. Apparently, Claimant never advised either practitioner that he had reported significant back pain in 2004, including episodes of bowel and bladder incontinence.

14. At hearing, Claimant testified that he now experiences increased low back and leg pain, and more frequent loss of bladder control since January 10, 2006.

15. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds Claimant is not a credible witness.

DISCUSSION AND FURTHER FINDINGS

16. **Accident.** The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v.

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Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

17. Claimant's testimony and reports regarding the occurrence of an alleged accident on January 10, 2006, are partly inconsistent. More concerning are his actions subsequent to the alleged accident, including his delay in seeking medical attention, his delay in reporting the alleged accident, and the materially incomplete medical history which he provided to the practitioners who treated him shortly after the alleged accident.

18. At hearing Claimant initially testified that he did not have back pain greater than 3 on a scale of 1 to 10 after recovering from his fusion surgery until the alleged accident on January 10, 2006. However, on cross-examination he acknowledged that he suffered significant low back pain in 2004, which he had reported to various medical providers as 7 or 8 on a scale of 1 to 10. At hearing, Claimant testified he heard three "pops" in his back when he allegedly struck a pothole on January 10, 2006. The emergency room physician recorded that Claimant heard a pop at the time of the alleged accident. Claimant testified at hearing that he stained his shorts as a result of the January 10, 2006, incident, yet when examined by Timothy J. Johans, M.D., on October 17, 2006, Claimant never advised Dr. Johans of bowel incontinence at the time of his alleged accident.

19. Further undermining the credibility of Claimant's account is his delay in reporting the alleged accident. Claimant completed his time sheet for January 10, 2006, but failed to respond to the question thereon of whether he had been injured at work. Yet Claimant testified he experienced severe pain and nearly immediate bladder and bowel incontinence. Failure to promptly report the event and promptly seek medical attention for a condition so alarming is contrary to common sense. Yet Claimant ostensibly waited three days to seek medical help and several days to report the alleged event to Employer.

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20. The Referee finds unconvincing Claimant's testimony alleging an industrial accident on January 10, 2006, in which Claimant lost bowel and bladder control. Claimant has failed to prove he suffered an industrial accident on or about January 10, 2006.

21. **Causation.** Even assuming the occurrence of the January 10, 2006, event alleged by Claimant herein, he must still establish medical causation. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). In the present case, Defendants assert that Claimant has not established that the alleged industrial accident of January 10, 2006, caused him injury.

22. Claimant's chiropractor, Henry West, opined that Claimant's alleged accident on January 10, 2006, caused his acute lumbar compression injury. However West did not have the benefit of a full understanding of Claimant's medical history. Similarly, Dr. Blair, who also apparently believed Claimant's alleged accident caused his back symptoms, did not have Claimant's complete medical history. Neither practitioner was apparently ever informed that Claimant suffered significant lumbar pain and repeated bowel and bladder incontinence during the two years prior to January 10, 2006. The foundation for their opinions is materially incomplete, rendering their opinions unpersuasive.

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23. Dr. Johans opined that Claimant's alleged accident did not cause his current symptoms. Dr. Johans noted that Claimant had been examined previously by neurologists specifically for bowel and bladder incontinence. Dr. Johans testified that an individual with neurologic bowel and/or bladder incontinence would generally exhibit sensory deficits in the mid-abdomen or pelvic areas especially in the perineal and perianal areas. Claimant reported, and Dr. Johans found, no such sensory deficits, nor did any of the physicians examining Claimant on January 13, 2006, or at any time after his alleged January 10, 2006, accident. Dr. Johans testified that a compressive cause severe enough to cause incontinence would also produce profound leg strength loss and near paraplegia. Claimant exhibited no such loss of leg strength. Dr. Johans also noted Claimant's varied and inconsistent reports of the distribution of right leg numbness. Claimant reported foot drop and floppy feet, when in fact, he did not demonstrate such symptoms when examined by Dr. Johans. Dr. Johans further testified that, unbeknownst to Claimant, Dr. Johans observed Claimant as he walked outside Dr. Johans office and that Claimant exhibited no foot drop, floppy feet, or any other indication of back symptoms. Dr. Johans examined Claimant's lumbar MRI scans and testified that the symptoms Claimant complained of were neurologically impossible given the benign nature of his MRI scans. Dr. Johans' opinion is thorough, well-reasoned, and persuasive.

24. The Referee finds that Claimant has not proven that his alleged accident of January 10, 2006, caused him immediate bowel and bladder incontinence or the other physical symptoms of which he complained thereafter.

25. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he suffered an accident arising out of and in the course of employment on January 10, 2006.

2. Claimant has failed to prove the alleged accident of January 10, 2006, caused the physical symptoms of which he complained thereafter.

3. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this _13th_day of September, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Alan Reed Taylor, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13th__ day of September, 2007, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

DELWIN ROBERTS
1495 E 17TH STREET
IDAHO FALLS ID 83404

TYRA STUBBS
PO BOX 519
BOISE ID 83701

ka

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT ELLIS,)	
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Claimant,)	IC 2006-000919
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v.)	
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TRANSYSTEMS,)	
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Employer,)	
)	ORDER
)	
AMERICAN CASUALTY COMPANY)	
OF READING, PA,)	
)	
Surety,)	Filed September 13, 2007
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant has failed to prove he suffered an accident arising out of and in the course of employment on January 10, 2006.
2. Claimant has failed to prove the alleged accident of January 10, 2006, caused the physical symptoms of which he complained thereafter.

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3. All other issues are moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 13th day of September, 2007.

INDUSTRIAL COMMISSION

/S/ _____
James F. Kile, Chairman

/S/ _____
R. D. Maynard, Commissioner

/S/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

DELWIN ROBERTS
1495 E 17TH STREET
IDAHO FALLS ID 83404

TYRA STUBBS
PO BOX 519
BOISE ID 83701

ka

_____/s/_____